

NEWS

NEW JERSEY DEPARTMENT OF

LWD

LABOR AND WORKFORCE DEVELOPMENT
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Department of Labor and
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RE: *Proposed Amendments: N.J.A.C. 12:17-14.2 Unemployment
Benefit Payments Waiver of Recovery of Benefit Overpayment*

Attached, please find the above-referenced matter which was published in the
Monday, April 3, 2006 *New Jersey Register*.

If you have any questions, please contact David Fish, Regulatory Officer at 609-
292-2789.

LABOR AND WORKFORCE DEVELOPMENT

(a)

DIVISION OF UNEMPLOYMENT INSURANCE

Unemployment Benefit Payments

Waiver of Recovery of Benefit Overpayment

Proposed Amendment: N.J.A.C. 12:17-14.2

Authorized By: David J. Socolow, Acting Commissioner,
Department of Labor and Workforce Development.

Authority: N.J.S.A. 43:21-7g.

Calendar Reference: See Summary below for explanation of
exception to calendar requirement.

Proposal Number: PRN 2006-112.

A public hearing on the proposed amendments will be held on the
following date at the following location:

Monday, May 8, 2006
10:00 A.M. to 12:00 Noon
New Jersey Department of Labor and Workforce Development
John Fitch Plaza
13th Floor Auditorium
Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 292-
2789 if you wish to be included on the list of speakers.

Submit written comments by June 2, 2006 to:

David Fish, Regulatory Officer
Office of Legal and Regulatory Services
Department of Labor and Workforce Development
P.O. Box 110, 13th Floor
Trenton, New Jersey 08625-0110
Fax: (609) 292-8246

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please contact the Office of Communications at (609) 292-7832 or NJ
Relay (TTY) 1-800-852-7899.

The agency proposal follows:

Summary

The proposed amendments to N.J.A.C. 12:17-14.2 are prompted by the
Department's desire to ensure that the standards set forth in the rule are
expressed in a precise manner, which may be easily understood by both
claimants who are seeking waiver of recovery of benefit overpayment
and Departmental staff who are responsible for determining whether such
waivers should be granted.

As written, existing N.J.A.C. 12:17-14.2 is potentially confusing. For
example, existing N.J.A.C. 12:17-14.2(a) provides that a waiver of
recovery of benefit overpayment may be granted, "...providing the
claimant did not misrepresent or withhold any material fact in obtaining
benefits and the recovery of the overpayment, as determined by the
Director, would be patently contrary to principles of equity." The next
sentence within subsection (a) states that, "A claimant who is overpaid
benefits shall be liable to refund the amount overpaid unless a request is
made that the Director waive the right to recover the overpayment, and:
1. The overpayment did not occur due to a claimant's willful
misrepresentation or nondisclosure to the Division; or 2. The claimant is
deceased or permanently disabled and no longer able to work." The first
sentence listed above does not address the issue of whether a claimant is
deceased or permanently disabled and no longer able to work. The second
sentence listed above does not address whether overpayment would be
patently contrary to principles of equity. Both sentences, however,
address the issue of a claimant misrepresenting or withholding
information. The first sentence joins criteria for the granting of a waiver
with the word "and," whereas the second sentence joins waiver criteria
with the word "or." The first sentence requires that there have been no
misrepresentation or withholding of any material fact, whereas the second
sentence requires that the overpayment not have occurred due to a
claimant's "willful misrepresentation or nondisclosure to the Division,"
thereby both interjecting for the first time within the second sentence the

concept of willfulness and also neglecting to mention within the second sentence the concept of "material fact." Finally, subsection (b) provides that "A claimant who negligently reports or fails to report information, which results in overpayment, is at fault and is liable for repayment," thereby introducing the concept of "fault," which is not explicitly addressed in the earlier subsection.

It is the Department's belief that the criteria for waiver of recovery of benefit overpayment must be set forth in a more clear and concise manner. Toward that end, the Department is proposing that N.J.A.C. 12:17-14.2(a) state that upon request of the claimant or the claimant's representative, the Director may grant the claimant a full waiver of recovery of an overpayment of benefits only after the Director has determined that the claimant has not misrepresented or withheld any material fact in obtaining benefits and only under the following circumstances: (1) where the claimant is deceased, (2) where the claimant is disabled and no longer able to work; or (3) where the recovery of overpayment, as determined by the Director with the Controller's concurrence, would be patently contrary to the principles of equity. Thus, it would be clear that under no circumstances shall a claimant be granted a waiver where he or she has misrepresented or withheld any material fact in obtaining benefits. Moreover, it would be clear that once the Director has determined that the claimant has not misrepresented or withheld any material fact in obtaining benefits, there would be only three circumstances which would justify a waiver, namely, (1) where the claimant is deceased, (2) where the claimant is disabled and no longer able to work, or (3) where the recovery of overpayment, as determined by the Director with the Controller's concurrence, would be patently contrary to principles of equity.

Proposed N.J.A.C. 12:17-14.2(b) would explain that for purposes of determining, under proposed N.J.A.C. 12:17-14.2(a), whether a claimant is prohibited from receiving a waiver of recovery of an overpayment of benefits because he or she misrepresented or withheld any material fact in obtaining benefits, either the willful or the negligent misrepresentation or withholding of any material fact would, alone, constitute sufficient grounds for a determination by the Director that the claimant is not eligible to receive a waiver of recovery of an overpayment of benefits. As indicated earlier, when portions of existing N.J.A.C. 12:17-14.2(a) and (b) are taken together, they indicate that either willful or negligent misrepresentation or withholding of any material fact will constitute grounds for refusal by the Director to grant a waiver of recovery of benefit overpayment.

Existing N.J.A.C. 12:17-14.2(b) indicates that when determining "fault," the Director shall consider the capacity of the particular claimant to recognize the error resulting in the overpayment, adding that the claimant will not be considered "at fault" if the benefits were retained because of the claimant's reasonable good faith reliance on the Division. This discussion of "fault" is one of the more confusing aspects of the existing rule. Fault should not be an issue when considering whether to grant a waiver of recovery of benefit overpayment, except with regard to whether the claimant willfully or negligently misrepresented or withheld any material fact, in which case he or she would be prohibited from receiving the waiver under the criteria set forth at N.J.A.C. 12:17-14.2(a) and (b). Consequently, the Department is proposing that the first two sentences of existing N.J.A.C. 12:17-14.2(b) be deleted. This proposed amendment would not be inconsistent with the controlling law, N.J.S.A. 43:21-16(d)(1), which states in pertinent part:

When it is determined by a representative or representatives designated by the Director of the Division of Unemployment and Temporary Disability Insurance of the Department of Labor of the State of New Jersey that any person, whether (i) by reason of the nondisclosure or misrepresentation by him or by another of a material fact (whether or not such nondisclosure or misrepresentation was known or fraudulent), or (ii) for any other reason, has received any sum as benefits under this chapter (R.S. 43:21-1, et seq.) while any conditions for the receipt of benefits imposed by this chapter (R.S. 43:21-1, et seq.) were not fulfilled in his case, or while he was disqualified from receiving benefits, or while otherwise not entitled to receive such sum as benefits, such person, unless the director (with the concurrence of the controller) directs otherwise by regulation, shall be liable to repay those benefits in full.

New N.J.A.C. 12:17-14.2(c) would state that for purposes of determining whether a claimant is "disabled and no longer able to work" under proposed new N.J.A.C. 12:17-14.2(a)2, a claimant's current receipt of Social Security disability benefits may be deemed evidence of current permanent disability. N.J.A.C. 12:17-14.2(c) would also state that the Director may accept a diagnosis of permanent disability from the claimant's physician, adding that the Director has the discretion to require the claimant to submit to an impartial physical examination by a legally-licensed physician at the expense of the State. This language is taken verbatim from existing N.J.A.C. 12:17-14.2(b)1.

New N.J.A.C. 12:17-14.2(d) would state that for purposes of determining under proposed new N.J.A.C. 12:17-14.2(a)3 whether the recovery of the overpayment would be "patently contrary to the principles of equity," the Director and Controller shall consider whether the terms of a reasonable repayment schedule would result in economic hardship to the claimant. This proposed amendment would memorialize in rule a long-standing practice of the Department. As with the proposed amendment to N.J.A.C. 12:17-14.2(b) discussed above, this amendment would not be inconsistent with N.J.S.A. 43:21-16(d)(1).

As the Department has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed amendments to N.J.A.C. 12:17-14.2 would have a positive social impact in that they would provide guidance to those reading the rules as to the standard being applied by the Department when determining whether to grant a request for waiver of recovery of benefit overpayment. As explained in the Summary above, the proposed amendments are intended to ensure that the standards set forth in the rule are expressed in a precise manner, which may be easily understood by both claimants who are seeking waiver of recovery of benefit overpayment and Departmental staff who are responsible for determining whether such waivers should be granted.

Economic Impact

The proposed amendments to N.J.A.C. 12:17-14.2 would have no economic impact, since as indicated above, they would not change the method used by the Department to assess the merits of a request for waiver of recovery of benefit overpayment, but rather, would set forth the standard for determining whether such waivers should be granted in such a way that it can be easily understood. As indicated earlier, the existing rule, as written, is potentially confusing. It is the Department's intent through the proposed amendments to eliminate that potential confusion.

Federal Standards Statement

The proposed amendments do not exceed standards or requirements imposed by Federal law. Specifically, the proposed amendments are consistent with the Federal Unemployment Tax Act, 26 U.S.C. §§3301 et seq., and the regulations promulgated in accordance therewith, 20 CFR §610 et seq. Consequently, a Federal standards analysis is not required.

Jobs Impact

The proposed amendments would have no impact on either the generation or loss of jobs.

Agriculture Industry Impact

The proposed amendments would have no impact on the agriculture industry.

Regulatory Flexibility Statement

The proposed amendments would impose no reporting, recordkeeping or other compliance requirements on small businesses as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. As indicated in the Economic Impact statement above, the proposed amendments would have no adverse economic impact on businesses, small or large. Specifically, the proposed amendments would affect only claimants (individual people; not businesses, small or large) who have received an unemployment benefit overpayment and are seeking waiver of the Department's recovery of that overpayment. With regard to those individuals, the proposed amendments would not change the method used by the Department to assess the merits of a request for waiver of recovery of benefit overpayment, but rather, would set forth the standard for

determining whether such waivers should be granted in such a way that it can be easily understood. The existing rule, as written, is potentially confusing. It is the Department's intent through the proposed amendments to eliminate that potential confusion. The Department does not anticipate that professional services would be needed in order to comply with the proposed amendments.

Smart Growth Impact

The proposed amendments would not have an impact on the achievement of smart growth and the implementation of the State Development and Redevelopment Plan.

Full text of proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

12:17-14.2 Waiver of recovery of benefit overpayment

[(a) The claimant or the claimant's representative may request full waiver of recovery of an overpayment of benefits. Such waiver may be granted by the Director, with the Controller's concurrence providing the claimant did not misrepresent or withhold any material fact in obtaining benefits and the recovery of the overpayment, as determined by the Director, would be patently contrary to principles of equity. A claimant who is overpaid benefits shall be liable to refund the amount overpaid unless a request is made that the Director waive the right to recover the overpayment, and:

1. The overpayment did not occur due to a claimant's willful misrepresentation or nondisclosure to the Division; or
2. The claimant is deceased or permanently disabled and no longer able to work.

(b) In determining fault, the Director shall consider the capacity of the particular claimant to recognize the error resulting in the overpayment. The claimant will not be considered at fault if the benefits were retained because of the claimant's reasonable good faith reliance on the Division. A claimant who negligently reports or fails to report information, which results in an overpayment, is at fault and is liable for repayment.

1. A claimant's current receipt of Social Security disability benefits may be deemed evidence of current permanent disability, which may constitute a waiver. The Director may also accept a diagnosis of permanent disability from the claimant's physician. In addition, the Director has the discretion to require the claimant to submit to an impartial physical examination by a legally-licensed physician at the expense of the State.]

(a) Upon request of the claimant or the claimant's representative, the Director may grant the claimant a full waiver of recovery of an overpayment of benefits only after the Director has determined that the claimant has not misrepresented or withheld any material fact in obtaining benefits and only under the following circumstances:

1. Where the claimant is deceased;
2. Where the claimant is disabled and no longer able to work; or
3. Where the recovery of the overpayment, as determined by the Director with the Controller's concurrence, would be patently contrary to the principles of equity.

(b) For purposes of determining under (a) above whether a claimant is prohibited from receiving a waiver of recovery of an overpayment of benefits because he or she misrepresented or withheld any material fact in obtaining benefits, either the willful or the negligent misrepresentation or withholding of any material fact shall, alone, constitute sufficient grounds for a determination by the Director that the claimant is not eligible to receive a waiver of recovery of an overpayment of benefits.

(c) For purposes of determining under (a)2 above whether a claimant is "disabled and no longer able to work", a claimant's current receipt of Social Security disability benefits may be deemed evidence of current permanent disability. The Director may also accept a diagnosis of permanent disability from the claimant's physician. In addition, the Director has the discretion to require the claimant to submit to an impartial physical examination by a legally-licensed physician at the expense of the State.

(d) For purposes of determining under (a)3 above whether the recovery of the overpayment would be "patently contrary to the principles of equity," the Director and Controller shall consider

whether the terms of a reasonable repayment schedule would result in economic hardship to the claimant.

[(c)](e) (No change in text.)